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NO. 63441-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KATHY WALKER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Did the prosecutor commit reversible error in his closing argument?

B. STATEMENT OF FACTS

On September 30, 2007, the Seattle Animal Shelter received a call from a woman identifying herself as “Gloria Johnson,” who stated she had a dead dog that needed to be picked up. (2/26/09, RP 79¹.) This woman stated she just looked out into her back yard and saw the dead dog. (2/26/09, RP 83.) The caller stated her address was 947 23rd Avenue in Seattle, WA, and her phone number was (206) 926-3927. (2/26/09, RP 81.)

Approximately 30 minutes after this call was received, Seattle Animal Shelter Officer Nemins arrived at the residence located at 947 23rd Avenue. (2/26/09, RP 91.) Nobody answered the door and Officer Nemins left a door-hanger with information to call the Seattle Animal Shelter. (2/26/09, RP 91.) Later that day, Officer Nemins left a voice message on the caller’s phone stating

¹ The State will follow the same reporting format utilized by the appellant. RP will refer to Report of Proceedings; CP will refer to Clerk’s Papers.

she had been out to the residence to pick up the dead dog, but nobody was home. (2/26/09, RP 93.)

Two days later, on October 2, 2007, Seattle Animal Shelter Officer Deruyter called the number, (206) 926-3927, at 11:05 am and left a message asking if the caller still needed a dead dog to be picked up. (3/2/09, RP 150.) Approximately fifty-five minutes later, "Gloria Johnson" called the Shelter back and stated she still needed the dead dog to be picked up. (2/26/09, RP 94.) The caller was advised by the Shelter operator that she had to be present at the time of the pick-up to sign a release. Gloria Johnson said she would be home after 5:15 pm that afternoon. (2/26/09, RP 94.)

At 6:12 pm that evening, Seattle Animal Shelter Officer Adams went to the residence at 947 23rd Avenue and was met in front of the residence by a young girl who identified herself as "Ashley Johnson." (2/26/09, RP 102.) The young girl told Officer Adams she had been advised by her mother the officer was coming to pick up the "dogs." (2/26/09, RP 102.) Because Officer Adams had been dispatched to the residence to pick up only one dead dog, she confirmed with the young girl that there were, in fact, two dead dogs on the property. (2/26/09, RP 103.) This was the first time anybody from the Seattle Animal Shelter had heard there were

two dead dogs to be picked up at this residence. (2/26/09, RP 103.) The young girl advised Officer Adams her mother was at the gym and had said it was okay for the officer to take the dogs. (2/26/09, RP 103.)

Officer Adams called the Seattle Police Department to provide her with assistance. (2/26/09, RP 104.) In the back yard of the residence, Officer Adams found two dead dogs. One dog, a small black puppy, was lying in a bassinet with its leash tied to the bumper of an automobile parked in the back yard. (2/26/09, RP 105.) The second dog, a small brown puppy, was lying inside a wire cage on the other side of the automobile. (2/26/09, RP 105.) Both animals appeared to be severely emaciated. (2/26/09, RP 105.) Before Officer Adams left the residence with the dead animals, she filled out a door hanger requesting the owner to call the Seattle Animal Shelter within 24 hours. (2/26/09, RP 108.)

The dead animals were transported from the Seattle Animal Shelter to the Phoenix Laboratories in Everett, WA for necropsies. (2/26/09, RP 89.) The veterinary pathologist who performed the necropsies testified (1) there was no question the cause of death for both animals was starvation; (2) both animals died at around the

same time; and (3) there were no indications of any disease or exterior wounds in either of the animals. (3/2/09, RP 213-15.)

On October 3, 2007, the day after the dead dogs had been retrieved, Officer Adams received a voice-mail message from "Gloria Johnson." Officer Adams called the number back and left a voice message asking Gloria Johnson to call her supervisor, Ann Graves, as soon as possible. (2/26/09, RP 109.)

On October 4, 2007, Supervisor Graves retrieved a voice-mail message from Gloria Johnson. She returned the call and left a voice-mail message asking Gloria Johnson to call her as soon as possible. (3/2/09, RP 187.) Three hours later, Supervisor Graves left a second voice-mail message asking Gloria Johnson to call her. She never received a response to these messages. (3/2/09, RP 187.)

On October 6, 2007, and October 8, 2007, Officer Adams left voice-mail messages for Gloria Johnson at (206) 926-3927, asking her to call the Seattle Animal Shelter. Officer Adams never received a response to these messages. (2/26/09, RP 110.) On October 13, 2007, Officer Adams went back to the residence of Gloria Johnson at 947 23rd Avenue and knocked on the front door. There was no response. (2/26/09, RP 110.)

Lambert Rochfort testified that he worked for a company called Solid Ground, a multiservice agency that provides a number of different social services, including a voice-mail service. (2/26/09, RP 119.) The voice-mail service is free for individuals receiving assistance from DSHS. (2/26/09, RP 120.) According to Mr. Rochfort, individuals enrolled in this program are assigned a voice-mail number which can be used to receive messages. (2/26/09, RP 120.) During the period of September 2007 through February 2008, the number (206) 926-3927 had been assigned to the appellant, Kathy Walker. (2/26/09, RP 122.)

Michael Bekele testified that he is the owner of the residence located at 947 23rd Avenue in Seattle, WA. (3/2/09, RP 164.) According to Mr. Bekele, he rented this house to the appellant, Kathy Walker, from sometime in 2004 until October 2007. (3/2/09, RP 165.) According to the lease agreement for this residence, the appellant was required to give Mr. Bekele twenty days notice that she intended to leave the residence. (3/2/09, RP 168.) Mr. Bekele testified the appellant gave no notice and abandoned the premises sometime around the end of September 2007. (3/2/09, RP 168.) According to Mr. Bekele, the appellant left behind a closet full of clothes and lots of furniture, but did not leave a forwarding address.

(3/2/09, RP 171.) When Mr. Bekele was cleaning the residence after the appellant's departure, he saw stains from a dog or dogs on the upstairs carpet, a comforter with dog hair on it in one of the bedrooms, a bowl of dog food in the kitchen area, and dog feces on some newspaper in the basement. (3/2/09, RP 170-71.)

Thomas Kiehne testified that he resided in a house directly behind the appellant, and their properties were separated by a six foot privacy fence. (3/2/09, RP 153.) According to Mr. Kiehne, he heard a dog barking frequently at the Walker residence during the summer of 2007. (3/2/09, RP 153.) In the late part of that summer, Mr. Kiehne heard the dog making a high-pitched yelp, as if the dog was desperate. (3/2/09, RP 154.) Mr. Kiehne looked over the fence and saw a small brown dog tied to a vehicle in the back yard. (3/2/09, RP 155.) Mr. Kiehne spoke with the appellant's daughter, McKensie, and told her he thought something was wrong with her dog. (3/2/09, RP 155.)

Danny Brown testified he lived next door to the appellant. In the summer of 2007, Mr. Brown frequently saw a brown puppy tied up on the front door steps at the appellant's residence, and the dog constantly barked. (2/26/09, RP 125.) On a few occasions, Mr. Brown saw the appellant's daughter bring the brown dog out

from inside the house and tie it to the front door. (2/26/09, RP 127.)

On one afternoon, he saw the brown puppy sitting on the back door steps. He saw the appellant pick the dog up and place it in a metal cage in the back yard. (2/26/09, RP 128.) A couple of days after this, Mr. Brown saw the police and Seattle Animal Control in the back yard of the appellant's residence. (2/26/09, RP 141.)

On February 2, 2008, the appellant met with Officer Adams and Supervisor Graves at the Seattle Animal Shelter. (2/26/09, RP 111.) During this interview, the appellant told Officer Adams and Supervisor Graves the dogs did not belong to her. They were owned by two homeless women. The appellant had allowed the women to leave the dogs in her yard with the understanding they would take care of the animals. The appellant believed she was not responsible for these animals. During this meeting, Officer Adams was able to see pictures of the appellant's daughter, McKensie. Officer Adams recognized McKensie as the young girl who introduced herself to Officer Adams on October 2, 2007, as "Ashley Johnson." (2/26/09, RP 112.)

On March 3, 2009, the jury returned a verdict of guilty against the appellant on two counts of animal cruelty in the first degree. (CP 28.)

C. ARGUMENT

THE PROSECUTOR DID NOT COMMIT REVERSIBLE ERROR IN HIS CLOSING ARGUMENT.

1. "The Thing Speaks For Itself."

Contrary to the appellant's assertion, the prosecutor was not trying to invoke the civil doctrine of *res ipsa loquitur* in his closing argument to the jury. The civil doctrine of *res ipsa loquitur* stands for the principle that in a civil action, an accident may happen under circumstances that will allow the occurrence itself to circumstantially establish prima facie negligence on the part of the defendant without further direct proof. Jackson v. Washington State Criminal Justice Training Commission, 43 Wash. App. 827, 829, 720 P.2d 457 (1968). The doctrine of *res ipsa loquitur* has no application in a criminal trial.

In this trial, the vast majority of the eye-witness testimony was centered upon the brown puppy. There was very little eye-witness testimony about the black puppy. The circumstances of the black puppy's death, however, totally mirrored the circumstances of the brown puppy's death: both dogs were found lying next to each another in the back yard; both dogs had been

restrained; both dogs had died from starvation; and both dogs had died at around the same time.

The prosecutor in closing argument advised the jury that the death of the black puppy “speaks for itself.” In other words, even though the jury was to consider each count separately, the jurors could view the evidence surrounding the brown puppy’s death when making its decision regarding the appellant’s innocence or guilt for the black puppy’s death. The death of the black puppy was so similar to the death of the brown puppy that “the thing speaks for itself.”

A prosecutor has “wide latitude” in closing argument to draw and express reasonable inferences from the evidence. State v. Stenson, 132 Wash.2d 668, 727, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). Furthermore, allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Graham, 59 Wash. App. 418, 428, 798 P.2d 314 (1990).

The jury was instructed by the trial court to disregard any remark, statement or argument of a lawyer if it was not supported by the evidence or the law in its instructions. (CP 32.) The jury

was also instructed that the defendant was to be presumed innocent, that the burden was on the State to prove each element of each crime beyond a reasonable doubt, and that the defendant had no burden to prove anything. (CP 36.) Absent any contrary showing, a jury is presumed to follow the instructions of the trial court. State v. Davenport, 100 Wash.2d 757, 763-64, 675 P.2d 1213 (1984). The prosecutor did not attempt to shift or lessen the State's burden of proof in this trial.

It is important to note that defense counsel, a very experienced and proficient trial attorney, did not object to these remarks. A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Stenson, 132 Wash.2d at 668.

The failure to request a curative instruction or move for a mistrial strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial. State v. Swan, 114 Wash.2d 613, 661, 790 P.2d 610 (1990). Furthermore, reversal is not required if the

error could have been avoided by a curative instruction but the defense failed to request one. State v. Martin, 41 Wash. App. 133, 140, 703 P.2d 309 (1985).

The State contends there was no error in making this argument to the jury, but if there was, such error would and could have been avoided by asking the trial court to instruct the jury to disregard these comments. By failing to object at trial, the appellant has waived any claim of error on appeal.

2. “Where There’s Smoke, There’s Fire.”

The appellant next contends that use of the phrase, “where there’s smoke, there’s fire,” in closing argument by the prosecutor constituted misconduct. The State disagrees, and has been unable to find any case law that condemns the use of this phrase. A defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial. State v. LuVene, 127 Wash.2d 690, 701, 903 P.2d 960 (1995). There has been no showing by appellant that it was erroneous for the prosecutor to make this statement to the jury.

In addition, defense counsel objected to this phrase and the trial court overruled his objection. Appellate courts give deference

to the trial court's firsthand view of alleged errors, because the trial court is in the best position to survey the effect of a remark on the defendant's right to a fair trial. State v. Borg, 145 Wash.2d 329, 336, 36 P.3d 546 (2001).

Prosecutorial misconduct requires a new trial only if the misconduct was prejudicial. State v. Graham, 59 Wash. App. 418, 426, 798 P.2d 314 (1990). Misconduct is prejudicial when there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Barrow, 60 Wash. App. 869, 876, 809 P.2d 209 (1991). There has been no showing by appellant that use of this phrase amounted to prejudicial misconduct.

3. "Abomination."

Similarly, the appellant contends that the prosecutor's use of the word, "abomination," in describing the death of these two puppies also constitutes misconduct. The appellant is not correct. It is within the range of legitimate argument for the prosecuting attorney to characterize the conduct of the accused in language which, although it consists of invective or opprobrious terms, accords with the evidence in the case. State v. Perry, 24 Wash.2d 764, 770, 167 P.2d 173 (1946).

4. Arguing Facts Not In Evidence.

The appellant finally contends the prosecutor committed misconduct by arguing facts not in evidence, specifically by commenting on the fact that when the appellant called the Seattle Animal Shelter, there was only one dead dog, but when the officer arrived two days later, there were now two dead dogs.

The State contends this was a fair argument. There is no question that when "Gloria Johnson" first called the Seattle Animal Shelter on September 30, 2007, she said there was "a dead dog to be picked up." (2/26/09, RP 83.) Two days later, on October 2, 2007, Officer Graves was surprised to learn there were actually two dead dogs to be picked up. (2/26/09, RP 103.)

The reason this evidence was significant is this: At the point in time on September 30, 2007, when the appellant realized the brown puppy had died, there may have still been time to save the black puppy. Had the appellant alerted the Seattle Animal Shelter about the true facts, not used a fictitious name, and not avoided staff members on the phone or in person, personnel from the Shelter could have immediately responded and given aid to the black puppy. The appellant did nothing, and the black puppy died a short time later.

The prosecutor's argument was a fair inference derived from the evidence admitted at trial.

D. CONCLUSION

For the foregoing reasons, this Court should affirm appellant's convictions for Animal Cruelty in the First Degree as set forth in Counts 1 and 2 of the Amended Information.

DATED this 3rd day of March, 2010.

Respectfully submitted,

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